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Political View

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By Marjorie Cohn

Yesterday, the Senate Judiciary Committee began its confirmation hearings on the nomination of Samuel Alito for Associate Justice of the Supreme Court.

Alito is no John Roberts. Whereas Roberts had barely been a judge for two years when Bush nominated him for the Supreme Court, Alito has authored 361 opinions during his 15-year tenure on the federal court bench. Whereas Roberts is photogenic, with a winning smile, Alito is stiff and awkward before the cameras. Most significantly, whereas Roberts replaced Chief Justice William Rehnquist, who had a similar judicial philosophy, Alito would take the place of Justice Sandra Day O'Connor, who provided the swing vote 77 percent of the time.

If confirmed, Alito would tip the high court's delicate balance radically to the right. Nearly always favoring the government, corporations and universities, Alito has ruled against individual rights in 84 percent of his dissents.

In a 196-page report released last week, the Alliance for Justice (AFJ) determined that in split decisions - the "difficult cases" - "the reasoning Judge Alito employs and the results he reaches are not balanced. Rather," the report found, "they track the staunchly conservative political and legal views he expressed in his 1985 application to be Deputy Assistant Attorney General for the Office of Legal Counsel in President Reagan's Justice Department."

Alito's 1985 application stresses his commitment to federalism (states' rights), his view that "the Constitution does not protect a right to an abortion," and his disagreement with the criminal procedure, reapportionment (one-man, one-vote), and Establishment Clause (church-state separation) decisions of the Warren Court. {moscomment}

The members of the Senate Judiciary Committee drew clear lines in yesterday's session. Although abortion was a significant concern for three senators from each party, the limitation on executive power was a much more prominent theme during the opening statements.

Six Democratic senators, as well as committee chairman Sen. Arlen Specter (R-Pa.), expressed alarm at the recent revelation that Bush has been secretly spying on Americans since 2002. Five Democrats made reference to O'Connor's opinion for the Court in *Hamdi v. Rumsfeld*: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

Alito's record reveals that he "has been extraordinarily deferential to the exercise of government power, especially executive branch power, except in cases involving alleged infringements on religious expression," according to the AFJ. His "judicial record strongly suggests that he will ... interpret the Constitution as giving the president greater authority to evade Congressional statutes and constitutional limitations whenever deemed essential to national security."

Indeed, in a memorandum he wrote as a lawyer in the Reagan Justice Department, Alito argued that the attorney general should receive absolute immunity from lawsuits when he illegally wiretaps Americans. The Supreme Court rejected Alito's view in a 1985 decision.

Alito also advocated that the president make a "signing statement" indicating what he thinks the law means when he signs a bill. Even though the Constitution grants the lawmaking power only to Congress, and thus courts look to congressional intent to interpret statutes, Alito hoped that the president could divert the courts' focus away from congressional intent in favor of what he called "the President's intent."

George W. Bush has issued at least 108 such "signing statements," according to the Washington Post. Most recently, Bush qualified his concurrence with the McCain amendment that outlaws torture and cruel, inhuman or degrading

treatment, implying that he would be free to torture if he felt it was necessary for national security.

In 2000, Alito told a Federalist Society meeting that he was a strong proponent of the "unitary executive," which means that all federal executive power resides in the president. This theory would reject discretionary executive power of independent agencies Congress has created since the New Deal, such as the Securities and Exchange Commission, the Federal Communications Commission, and the Federal Reserve Board.

Alito argued in other memoranda that the Federal Bureau of Investigation should have broad latitude to investigate federal employees, and that an American Bar Association opinion prohibiting lawyers from secretly taping conversations should not prevent IRS lawyers from secretly taping as part of a federal criminal investigation.

Although the senators only touched on Alito's alarming civil rights record in yesterday's session, one would hope they would fully inquire into this area during the questioning.

In split decisions on claims involving violations of the civil rights of women, racial minorities, seniors and the disabled, Alito almost uniformly ruled against the claimants.

As America mourns the deaths of the 12 miners in West Virginia, we are reminded of the importance of mine safety regulations. Yet Alito disagreed with the Department of Labor and would not have applied mine safety rules to an area of a defunct Pennsylvania mine from which the company was still extracting materials to process into energy.

Sen. Edward Kennedy (D-Mass.) has raised the issue of Alito's credibility. Although he promised the Senate Judiciary Committee in his 1990 confirmation hearing for the Court of Appeals that he would recuse himself from cases involving Vanguard companies, in which he had substantial financial investments, Alito subsequently proceeded to sit on a Vanguard case. And on his 1985 job application, Alito boasted of his membership in the ultraconservative Concerned Alumni of Princeton, which opposed co-education and affirmative action. Yet he now denies any memory of being in that group.

In his opening statement, Alito told the senators, "A judge can't have any agenda. A judge can't have any preferred outcome in any particular case."

Yet Sen. Chuck Schumer (D-NY) advised Alito, "We need to know that presidents and paupers will receive equal justice in your courtroom. If the records showed that an umpire repeatedly called 95 percent of pitches strikes when one team's players were up and repeatedly called 95 percent of pitches balls when the other team's players were up, one would naturally ask whether the umpire was being impartial and fair." Schumer observed, "The president is not a king, free to take any action he chooses without limitation by law. The court is not a legislature, free to substitute its own judgment for that of elected bodies. And the people are not subjects, powerless to control their own most intimate decisions."

Sen. Patrick Leahy (D-Vt.) said, "It's important to know whether [Alito] would serve with judicial independence or as a surrogate for the president nominating him." Sen. Russ Feingold (D-Wis.) declared, "We need judges on the bench who will ensure that the judicial branch of government is the independent check on executive power that the Constitution requires and that the American people expect. And in these days of corruption investigations and indictments in Washington, we also need judges who are beyond ethical reproach."

We will see during the questioning whether the senators will indeed hold Samuel Alito's feet to the fire, and demand that he forthrightly state his beliefs on the critical issues. Sen. Dianne Feinstein (D-Calif.) correctly noted that Alito's nomination is a "pivotal" one in the history of this country.

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